of California Penal Code Section 647(a) (soliciting or engaging in lewd conduct). A rehearing and certification to the California District Court of Appeal was denied on October 19, 1971.

JURISDICTION

Petitioners invoke jurisdiction of this Court under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

Petitioner alleges that the following questions are presented:

1. Whether California Penal Code Section 647(a), as construed and applied to prohibit a "solicitation" for "sex" is vague, indefinite, uncertain and overbroad, and constitutes an impermissible abridgment of petitioner's right to freedom of speech and deprives petitioner of liberty and property without due process of law contrary to the First and Fourteenth Amendments to the United States Constitution.

2. Whether Californa Penal Code Section 647(a), as construed and applied to prohibit lawful conduct which is nowhere defined as a crime, is vague, indefinite, uncertain and overbroad, and deprives petitioner of liberty and property without due process of law contrary to the Fourteenth Amendment to the United States Constitution.

3. Whether a conviction resulting from a general verdict based upon two intertwined charges, one of

which is unconstitutional, deprives petitioner of liberty and property without due process of law and denies to petitioner the equal protection of the law, contrary to the Fourteenth Amendment to the United States Consitution.

4. Whether petitioner's conviction based solely upon the testimony of an undercover police officer who actively sought the commission of a violation of California Penal Code Section 647(a) deprives petitioner of his liberty and property without due process of law and denies petitioner the equal protection of the law in violation of the provisions of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States.

California Penal Code Sections 6, 15, 647(a) and 952.

California Civil Code Section 13.

California Evidence Code Section 411.

All of the above are set forth in the appendix hereto.

STATEMENT OF THE CASE

Petitioner was arrested at approximately 2:00 a.m. on March 27, 1971, in the city of Long Beach after he had placed his hand on David Lundberg's penis and asked Mr. Lundberg to accompany him home to have

some sex. Mr. Lundberg is a police officer for the city of Long Beach, and at the time of the arrest of petitioner was working as a plain-clothes vice-officer. Petitioner's case was tried before a jury commencing on May 7, 1971, completed on May 10, 1971, with the verdict of guilty being returned on May 11, 1971. The jury was polled and each juror answered that "guilty" was his or her verdict. The case was reported.

As I read petitioner's statement of the case, he would have this Court believe that officer Lundberg performed overt acts while in the bar where he first met petitioner, that would lead a homosexual to believe that he was available for solicitation and for this reason officer Lundberg said "Hi," to the petitioner. The reported testimony of officer Lundberg was that he went into the bar dressed as a "straight" individual as opposed to a "swishy" homosexual, and while in the bar remained completely passive. It is true that officer Lundberg did say "Hi" to the petitioner, but this was in response to petitioner speaking to him first. No solicitation for a lewd act or a lewd act took place in the bar.

At closing time officer Lundberg left the bar. While walking down the sidewalk to meet his brother officer, petitioner pulled alongside officer Lundberg in his vehicle and asked officer Lundberg if he wanted a ride. Officer Lundberg declined but petitioner persisted, so officer Lundberg accepted. While petitioner was driving his Volkswagen he reached down and rubbed officer Lundberg's left ankle. In response officer Lundberg moved his foot away. When Petitioner

stopped the car he placed his hand on officer Lundberg's left thigh and began to rub it and stated, "Why don't we go to my apartment? I have a nice apartment and clean sheets on my bed." Officer Lundberg told petitioner that he had a buddy waiting for him. Petitioner then put his hand on officer Lundberg's stomach and stated, "I like chubby fellows." Officer Lundberg then started to open the door at which time petitioner placed his hand on officer Lundberg's penis and scrotum through his clothing and stated, "Why don't you go home with me and we will have some sex?" Officer Lundberg responded, "What do you mean by that?" To which petitioner replied, "Well, I will do anything you want me to to. I will please you in any way I can." Petitioner, who had removed his hand from officer Lundberg's crotch area, now placed his hand back in the area of officer Lundberg's penis. At this time officer Lundberg displayed his badge and identification and placed petitioner under arrest.

ARGUMENT

I

California's Penal Code Section 647(a) Is Not Vague, Indefinite, Uncertain And Overbroad, Constituting An Impermissible Abridgment Of Speech.

There is a "presumption in favor of constitutionality, and the invalidity of a legislative act must be clear before it can be declared unconstitutional" *(Patton v. La Bree,* 60 Cal. 2d 606, 608-609). "Statutes must be upheld unless their unconstitutionality clearly,

positively, and unmistakenly appears" (*In re Huddleson*, 229 Cal. App. 2d 618, 621).

The Supreme Court of the United States "has consistently held that lack of precision is not itself offensive to the requirements of due process . . . [T]he Constitution does not require impossible standards; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . .' *United States v. Petrillo*, 332 U.S. 1, 7, 8. *Roth v. United States*, 354 U.S. 476, 491. "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols; most statutes must deal with untold and unforseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded." *(Boyce Motor Lines v. United States*, (1952) 342 U.S. 337)

In *In re De La O*, 59 Cal. 2d 128, 153, it is said: "Words used in a statute are ordinarily to be construed according to the context and 'the approved usage is sufficiently certain if it employs words of long usage or within a common law meaning, "notwithstanding an element of degree in the definition as to which estimates might differ' " (*Trensor v. Superior Court*, (1950) 35 Cal. 2d 49, 60.). In *People v. Victor*, 62

Cal. 2d 780, 298, the court adhered to these rules, adding at page 299 that admittedly a word used in a particular statute may be "a relative one; but 'the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.' (*Nash v. United States*, (1913) 229 U.S. 373, 377)"

In short, the presence of an element of degree in the definition of the words used "does not of itself render the statutory language insufficiently certain to comply with due process." "Reasonable certainty is all that is required. A statute will not be held void for uncertainty if any reasonable and practical construction can be given its language." It could be upheld if its terms may be made reasonably certain by reference to other definable sources, (*American Civil Liberties Union v. Board of Education*, (1963) 59 Cal. 2d 203, 218, *People v. Victor*, 62 Cal. 2d 280, 300). "The complexities of the social problems dealt with by the legislature require that a practical construction be given to the language employed by the draftsmen of legislation lest their purposes be too easily nullified by overrefined inquiries into the meaning of words." (*People v. Vaughn*, 196 Cal. App. 2d 622, 632.)

In considering the words used in a statute, the court is required "to read the statute in the light of the objective sought to be achieved by it as well as the evil sought to be averted. (*Wotton v. Bush*, (1953) 41 Cal. 2d 460, 467)." (*In re Huddleson*, 229 Cal. App. 2d 618, 624.)

Section 647 was enacted by the legislature in 1961 to restate the law of vagrancy in California. The former Section 647 had been the subject of criticism because it designated as criminal the "status" of being a common drunkard or a common prostitute or being known as a pickpocket, thief, burglar or confidence operator. Following the suggestion of Professor Sherry the legislature redrafted Section 647 to replace "status" crimes with "conduct" crimes.

The conduct proscribed in Section 647(a) is to ". . . solicit anyone to engage in or engage in lewd or dissolute conduct . . ." What is lewd or dissolute conduct? ". . . lewdness or dissoluteness — terms often used interchangeably but each of which applies to the unlawful indulgence of lust, whether in public or priate." *In re McCue*, (1908) 7 Ca. App. 765, 766.

While "lewd" is defined to mean lustful, libidinous, lascivious, unchaste; and "dissolute" is defined to mean loose in morals and conduct, wanton, lewd, debauched; the two terms are often used interchangeably, each applying to the unlawful indulgence in lust, whether in public or private. *People v. Babb*, (1951) 103 CA. 2d 326, *People v. Loignon*, (1958) 160 CA. 2d 412, 420.

LEWD — inclined to, characterized by, or inciting to lust or lechery . . .

DISSOLUTE — indifferent to moral restraints: given over to dissipation; licentious. *The American College Dictionary by Random House*, 1962 edition.

LEWD — licentious, lustful, obscene.

DISSOLUTE — lacking in moral restraint, aban-

doned, debauched. *The American Heritage Dictionary*, 1970 edition.

Obscenity is not within the area of constitutionally protected speech or press. *Roth v. United States*, (1957) 354 U.S. 476. If obscenity is not within the area of constitutionally protected speech, solicitation to commit a lewd or dissolute act would likewise not be constitutionally protected by the 1st Amendment. Not all acts intended to express ideas or convey information are protected forms of free speech. *United States v. O'Brian*, (1968) 391 U.S. 367, 376. *In re Bushman*, 1 C. 3d 767, 773. "We cannot believe the legislature intended to subject innocent bystanders be they men, women or children, to the public blandishment of deviates . . . Nor do we feel the legislators were unaware of the open, flagrant and, to decent people, disgusting solicitations of sexual activity which have occurred on the public streets of our cities. Moreover, it is not to be forgotten that to some a homosexual proposition is inflammatory, which public utterance might well lead to a breach of the peace." *People v. Dudley*, 250 CA. 2d Supp. 955, 959 (1967), *In re Steinke*, 2 CA, 3d 569, 577 (1969). The testimony here was that Appellant placed his hand in the crotch area of the officer and stated, "Why don't you go home with me and we will have some sex." (Rep. Trans. P. 61, lines 16-18.) This is the type of conduct referred to in *People v. Dudley*, supra, conduct likely to lead to a breach of the peace and therefore not protected by the 1st Amendment. And of course the speech must be considered in the circumstances in which it was stated.

Applying these principles to the challenged language in California Penal Code Section 647(a), it cannot be said that the section is rendered unconstitutional on the theory that it is vague, indefinite, uncertain and overbroad, and constitutes an impermissible abridgment of petitioner's right to freedom of speech and deprives petitioner of liberty and property without due process of law.

II

California Penal Code Section 647(a), As Construed And Applied Does Not Prohibit Lawful Conduct Which Is Nowhere Defined As A Crime.

The language of petitioner's question assumes petitioner's conduct is lawful and not prohibited by statute. This is not the case of course. The substantive criminal law of California is entirely statutory and no act or omission is criminal or punishable as such unless, at the time of this act or omission, there is in force a valid statute or ordinance declaring the act therein defined to be punishable as a crime and prescribing a penalty for its violation. (California Penal Code, Section 6, 15; *People v. Whipple*, 100 Cal. App. 261.) California Penal Code Section 647(a) is the statute which defines as a crime and prohibits such conduct as petitioner committed against officer Lundberg.

The argument above in question I pertaining to the construction and application of California Penal Code Section 647(a) to speech would be applicable here as it pertains to conduct.

III

Petitioner's Conviction Was Not Based Upon Two Intertwined Charges, One Of Which Is Unconstitutional.

The complaint charged Appellant in the language of the statute. Section 952 of the California Penal Code provides that the charging of an offense is sufficient if the words of the enactment describing the offense or declaring the matter to be a public offense are used.

Where a defendant is charged in the language of the statute, except that the complaint is in the conjunctive rather than in the disjunctive, but is convicted of only one offense, evidence sufficient to support a finding of guilty of any one of the acts denounced by the statute is sufficient to sustain the conviction. *People v. Williams*, 16 CA. 2d Supp. 858 (1958), *In re De La O*, 59 Cal. 2d 128 (1963).

In the instant case there is sufficient evidence that petitioner did solicit officer Lundberg to engage in a lewd act and did engage in lewd conduct.

Petitioner asked officer Lundberg, "Why don't we go to my apartment? I have a nice apartment and clean sheets on the bed." This was said while rubbing officer Lundberg's left thigh. (Reporter's Transcript Page 61 lines 6 through 12.) Petitioner also asked officer Lundberg "Why don't you go home with me and we will have some sex?" During this statement petitioner had his hand in officer Lundberg's crotch area. (Reporter's Transcript, Page 61, lines 16 through

18.) When asked by officer Lundberg what petitioner meant by that statement, petitioner said "Well, I will do anything you want me to do. I will please you in any way I can." Petitioner then placed his hand back in the area of officer Lundberg's penis. (Reporter's Transcript, Page 61, lines 20 through 22.) This language of petitioner in conjunction with petitioner's conduct could be understood in no other way but that petitioner was soliciting officer Lundberg to engage in a lewd act.

There can be no question but that the conduct of petitioner described above constitutes lewd acts.

It is the People's contention that the portion of California Penal Code Section 647(a) prohibiting solicitation for a lewd act is not an impermissible abridgment of speech; therefore, this portion of the statute is constitutional as well as that portion prohibiting engaging in lewd conduct. There being only one crime charged and there being sufficient evidence to convict petitioner of both crimes prohibited by the statute, the conviction of the one crime should be sustained.

IV

Officer Lundberg Did Not Actively Seek To Have Petitioner Violate California Penal Code Section 647(a).

While petitioner never uses the word "entrapment" in arguing this question the only logical conclusion of his argument to this question is that he is trying to lead this Court to believe that he is a victim of entrapment on the part of officer Lundberg.

Entrapment has been defined as the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officers, *14 Cal. Jur.* 2d Crim. Law 205.

There is no evidence that the officer planned the offense. The officer was at a place he had every right to be when petitioner solicited and rubbed the officer in the crotch area. There is no evidence that the officer suggested that petitioner make the statements or do the acts. In what other manner could Section 647(a) be enforced? The officers activity in this case is analogous to dressing a male police officer as an elderly woman and having him walk in an area where many elderly women have been the victims of purse snatches in order to capture the criminal. If the officer's purse is snatched and the culprit apprehended, is this entrapment?

Entrapment is a positive defense, imposing on the accused the burden of showing he was induced to commit the offense for which he is on trial; where the doing of an act is a crime regardless of anyone's consent, if the criminal intent originates in the accused's mind and the offense is completed, the fact that an opportunity was furnished or that the accused was aided in the commission of the crime in order to secure evidence necessary to prosecute him therefore constitute no defense. *People v. D'Agostino*, (1961) 190 CA. 2d 447, 461.

The jury was instructed as to the law of entrapment. (Reporter's Transcript, Page 135, lines 25

through 28 and Page 136, lines 1 through 9.) The jury was also instructed as to the law regarding the testimony of an accomplice. (Reporter's Transcript, Page 134, lines 15 through 28, Page 135, lines 1 through 14.)

V

The Testimony Of One Witness Is Sufficient For The Proof Of Any Fact.

California Evidence Code Section 411 provides that the direct evidence of one witness is sufficient for proof of any fact.

CONCLUSION

Respondent submits that the issues raised by petitioner have been adequately dealt with in the courts below, therefore it is urged that a writ of certiorari be denied.

Dated April 25, 1972, Long Beach, California

Respectfully Submitted,

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The pertinent provisions of the First Amendment of the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; not shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The pertinent provisions of the California Penal Code are:

> Section 6. "No act or omission, commenced after twelve o'clock noon of the day on which this code takes effect as a law, is criminal or punishable, except as prescribed or authorized by this code, or by some of the statutes which it specifies as continuing in force and as not affected by its provisions, or by some ordinance, municipal, county, or township regulation, passed or adopted, under such statutes and in force when this code takes effect. Any act or omission commenced prior to that time may be inquired of,

prosecuted, and punished in the same manner as if this code had not been passed."

Section 15. "A crime or public offense is an act committed or omitted in violation of a law forbiding or commanding it, and to which is annexed, upon conviction, either of the following punishments:

1. Death;
2. Imprisonment;
3. Fine;
4. Removal from office; or,
5. Disqualification to hold and enjoy an office or honor, trust or profit in this state.

Section 647. "Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor":

(a) "Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view."

Section 952. "In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any techical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words

sufficient to give the accused notice of the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another."

CALIFORNIA EVIDENCE CODE

Section 411. "Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact."

CALIFORNIA CIVIL CODE

Section 13. "Words and phrases are construed according to the context and the approved usage of the langauge; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition."